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No. 02-555

IN THE

Supreme Court of the United States

DOUGLAS FORRESTER, *et al.*
Petitioners,

v.

NEW JERSEY DEMOCRATIC PARTY INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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BRIEF FOR RESPONDENTS, THE NEW JERSEY DEMOCRATIC PARTY INC., *ET AL.*, IN OPPOSITION

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QUESTION PRESENTED

Whether the New Jersey Supreme Court may interpret state election law, consistent with its longstanding precedents, to permit the Democratic Party to fill a vacancy on the ballot for the office of United State Senator and give the voters of New Jersey a choice of candidates from both major parties?

CORPORATE DISCLOSURE STATEMENT

The New Jersey Democratic Party, Inc., has no parent corporations and no publicly held company holds 10% or more of the company's stock.

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OPINION BELOW

The Supreme Court of New Jersey issued its order in this case on October 2, 2002. Pet. 1a. The order noted that the court's opinion in the matter would be filed in due course. Pet. 5a. On October 8, 2002, the Supreme Court of New Jersey issued its formal opinion in support of the October 2 order. Br. in Opp. 1a. Neither the opinion nor the order have yet been reported.

JURISDICTION

The order of the Supreme Court of New Jersey issued on October 2, 2002. Petitioners filed an application for stay pending the filing of a petition for certiorari with Justice Souter on October 3, 2002. Justice Souter referred the application to the full Court, which denied the application on

October 7, 2002. The petition for writ of certiorari was docketed on October 8, 2002, within the time limits provided by Rule 13.1. The Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1257(a), but the order of the court below was not final, since it remanded jurisdiction over the case to the supervision of a Judge in the Superior Court of Mercer County, New Jersey. See Pet. 5a.

STATEMENT

1. In the afternoon of September 30, 2002, Robert G. Torricelli, a candidate for the office of United States Senator for the State of New Jersey, withdrew as a candidate in the November 5 general election. The next morning, October 1, on the application of Respondents, New Jersey Democratic Party, Inc. and New Jersey Democratic State Committee (collectively "NJDSC"), the Superior Court of New Jersey, Law Division, Middlesex County, entered an Order to Show Cause with temporary restraints that enjoined all twenty-one County Clerks in the State of New Jersey from the further printing and distribution of official election ballots containing the name Robert G. Torricelli. Later that day, also on the application of NJDSC, the Supreme Court of New Jersey took direct certification of the matter, dismissed as moot the Order to Show Cause, but continued the stay against ballot preparation pending oral argument the next morning.

Appearing before the Supreme Court on October 2 were Respondents NJDSC, David Samson, Attorney General of the State of New Jersey, Douglas Forrester (a Petitioner herein), the Republican candidate for the office of Senator in the November 5 general election, counsel for the New Jersey Clerks Association (on behalf of the County Clerks), and representatives of the several third party candidates in the senatorial election.

2. Later that day, on October 2, the New Jersey Supreme Court issued an Order granting the application of NJDSC and

requiring that the name Robert G. Torricelli be removed from the official general election ballot and the name of the successor candidate duly selected by NJDSC be placed on such ballot. Pet. 5a. The Order further provided that "the preparation of revised ballots by the County Clerks shall proceed forthwith under the direction of the Attorney General of New Jersey and the supervision of Superior Court Judge Linda R. Feinberg, A.J.S.C. (Mercer County) who is empowered by this Order to exercise statewide jurisdiction over the process . . ." Pet. 5a. The New Jersey Supreme Court also ordered "that military and overseas ballots shall be given precedence in preparation and mailing." *Id.* The Supreme Court's Order directed the Attorney General of New Jersey to "oversee the election activities" described in the Order and "as the chief election official of the State of New Jersey," to "take all steps necessary to avoid voter confusion, including, but not limited to, the preparation of an explanatory letter to all voters to whom a revised ballot has been sent." *Id.* Finally, the Court ordered that Judge Feinberg set a schedule that would assure that all ballots be completed and returned in time for the November 5 general election for the office of United States Senator. *Id.*

3. On that same day, October 2, the NJDSC convened and, in accordance with the relevant statutory procedures and its own rules, selected Frank R. Lautenberg as the candidate to fill the vacancy created by the withdrawal of Mr. Torricelli. Upon the filing of the requisite Oath of Allegiance, Statement of Candidacy and Statement of Selection, Mr. Lautenberg was certified by the Attorney General as the Democratic candidate in the general election.

The next day, October 3, Judge Feinberg convened a hearing to implement the terms of the Supreme Court's Order. After a lengthy hearing and active input from all interested parties, Judge Feinberg entered a comprehensive order that provided for judicial and administrative oversight of the

balloting process and the efficient administration of the November 5 election. Among other things, Judge Feinberg ordered each of New Jersey's twenty-one County Clerks to certify by 2:00 p.m. on each day to the Attorney General a report on the following issues: "status of the printing process," "the number of absentee ballot applications received," and "the number of absentee ballots sent out." In turn, the Attorney General's office was ordered to report to the Court by 4:00 p.m. on each day a summary of the reports of the various County Clerks. In the absentee ballot printing and reprinting process, Judge Feinberg ordered that "priority must be given for the preparation and mailing of all overseas and military ballots." All absentee ballots, under Judge Feinberg's Order, "shall provide a postage paid return envelope or other commercial overnight mail service."

4. On October 3, 2002, Petitioner herein, Douglas Forrester, filed an emergency application to Justice Souter for a stay of enforcement of the judgment of the New Jersey Supreme Court pending the filing and disposition of a Petition for Writ of Certiorari. On October 4, this Petition for a Writ of Certiorari was filed. Also on October 4, NJDSC filed a brief in opposition to the Forrester application for a stay.

On October 7, 2002, Petitioner's application for a stay was denied.

Simultaneous with the filing of their Petition for a Writ of Certiorari, a Complaint and Order to Show Cause with Temporary Restraints was filed with the United States District Court for the District of New Jersey. That application requested that the District Court restrain the County Clerks from following the Order of the New Jersey Supreme Court. On October 7, 2002, the Honorable Garret E. Brown, Jr., U.S.D.J., dismissed the Complaint, finding that the federal court should abstain from addressing the issues already decided by the New Jersey Supreme Court.

5. On October 8, 2002, the New Jersey Supreme Court issued its unanimous opinion in support of its October 2 Order. On the record before it, the New Jersey Supreme Court was "[c]onvinced that the absentee ballots can be handled in a manner that will not disenfranchise absentee voters . . ." *N.J. Democratic Party, Inc. v. Samson*, A-24 Sept. Term 2002, slip op. at 25 (N.J. Oct. 8, 2002), Br. in Opp. 18a. As of October 1, there were approximately 19,000 absentee ballots authorized in the State of New Jersey. Of these, under 1,700—or approximately 9%—had actually been mailed to voters. Indeed, as of October 1, fourteen of New Jersey's twenty-one counties had not mailed any ballots and several counties had not printed all ballots. Of New Jersey's 19,000 authorized absentee ballots, 622 were military and overseas ballots. However, only 106 of such military and overseas ballots had actually been mailed to voters as of the October 1 stay. Only four absentee ballots statewide had been returned. Based on this record, the New Jersey Supreme Court concluded: "We are satisfied that the process we have put in place will be orderly and expeditious and that all voters will be able to cast their ballots for a candidate of their choice in the general election of November 2002." Br. in Opp. 18a.

Also on October 8, Judge Feinberg ordered "that for all approved absentee ballot applications . . . as of October 7, 2002, each County Clerk is to send out the applicable absentee ballot no later than Wednesday, October 9, 2002, using procedures approved by the New Jersey Attorney General . . ." Br. in Opp. 23a. Priority was to be given in the mailing of "corrected" ballots to all voters that had received a ballot containing the name of Mr. Torricelli. *Id.* Thus, the process of replacing Mr. Torricelli on the ballot was completed.

ARGUMENT

The New Jersey Supreme Court's decision correctly interprets state law in a manner consistent with its settled past precedent. Its decision correctly interprets both, and does not violate either, federal statutory law or provisions of the U.S. Constitution. It presents no important question of federal law, and does not conflict with prior decisions of this Court, or with decisions of any other courts, state or federal. See Rule 10(b), 10(c). Further review by this Court is therefore not warranted, and the petition should be denied.

Petitioners allege that New Jersey's interpretation of its laws, by ostensibly disregarding mandatory deadlines, violates Article I, § 4 of the Constitution. In support, Petitioners cite this Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000). As this Court warned in that case, however, the opinion there should be limited to its extraordinary facts. Unlike *Bush v. Gore*, this matter presents neither important federal questions nor a conflict with this Court's prior opinions. It does not involve unsettled questions about the constitutional mechanisms for selecting presidential electors, nor the thorny legal question of how differing legal standards for counting ballots might impact voters' equal protection rights. Rather, it presents nothing more than a state supreme court interpreting state law in a manner consistent with its settled past precedent.[1] Contrary to the Petitioners'

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[1] By the time this Petition is addressed, an election for United States Senate will have taken place. The voters of New Jersey will likely have elected either Douglas Forrester or Frank Lautenberg to the United States Senate. Jurisdiction to seat the individual elected by the New Jersey voters lies primarily in the United States Senate, not the courts, see U.S. Const. Art. I, § 5, and the question of who should be seated may pose a nonjusticiable political question. See *Baker v. Carr*, 369 U.S. 186 (1962). See also *Nixon v. United States*, 506 U.S. 224 (1993) (holding that the Impeachment Clause granted the Senate sole authority over judicial impeachments). Arguably, once the election occurs, this case is moot.

contention, there is nothing in the decision of the state court to distinguish it from the work of state courts around the country when called upon to apply state laws to varying circumstances. Petitioners' argument boils down to the suggestion that since this Court twice granted certiorari in the Florida cases, it should do so here well. The invitation should be rejected.

Nor do Petitioners salvage their position with the claim that the state court order conflicts with the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. §§ 1973ff *et seq*. and undermines the due process rights of overseas and military absentee voters. The "thirty-five day" requirement posited by the Petitioners under this statute does not exist. The court below structured and diligently administered a detailed process under executive branch and judicial supervision for the protection of the rights of all voters, including absentee voters. Nothing in the record supports the claim that any absentee voter has been disenfranchised in violation of his or her constitutional or statutory rights. To the contrary, that record reflects the informed belief of responsible state officials that those rights can be and have been protected under the carefully designed process utilized for the preparation and marking of revised ballots. No important question worthy of this Court's review is presented here.

1. The New Jersey Supreme Courts' Reasonable Interpretation Of State Law Does Not Violate The United States Constitution

Petitioners' primary argument in support of their petition is that the New Jersey Supreme Court, by allowing a replacement candidate on the general election ballot fewer than fifty-one days prior to the election, "re-wrote" N.J. Stat. Ann. § 19:13-20 and thereby usurped the power of the New Jersey state legislature to prescribe the time, place, and manner of elections for Senators in violation of Article I, § 4 of the

United States Constitution. See Pet. at 7-14. An analysis of the court's decision, however, reveals that the New Jersey Supreme Court, far from usurping legislative authority, properly applied longstanding legal precedent in New Jersey that has construed N.J. Stat. Ann. § 19:13-20 and other election laws as statutes that the Legislature intended to be directory in nature and, therefore, that permit the filling of a vacancy on the general election ballot fewer than fifty-one days before a general election.

This Court's review of state court judgments has long been informed by the recognition that this Court has "no authority" to review a state supreme court's interpretation of state law. See *O'Connell v. Kirchner*, 513 U.S. 1303 (1995) (Stevens, J.) (denying petition for a stay of Illinois Supreme Court decision on issue of Illinois law); see also *Bush v. Gore*, 531 U.S. 98, 111 (2000) ("[n]one are more conscious of the vital limits on judicial authority than are the members of this Court. . .").

The authority of state courts to review election laws is no different than their authority to review any other laws; indeed, "interpretation of laws is the proper and peculiar province of the Courts." The Federalist No. 78 (Alexander Hamilton); see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-178 (1803). Moreover, Petitioners' argument to the contrary notwithstanding, the state legislature's authority in regulating elections of Senators is not exclusive. As the Court noted in *McPherson v. Blacker*, 146 U.S. 1 (1892), relied upon by Petitioners, a state supreme court is constitutionally permitted to interpret a state law governing the appointment of electors. Indeed, the Court stated that "[w]e are not authorized to revise the conclusions of the state court on these matters of local law." *Id.* at 23. In a number of subsequent cases, the Court has concluded that the delegation to state legislatures to prescribe the "Manner" of congressional elections, in accordance with Article I, § 4, does not exclude the state courts or state governors from also carrying out their ordinary law-

making role as congressional elections proceed. See *Growe v. Emison*, 507 U.S. 25, 34 (1993) (Court held that state courts, in addition to state legislatures, could redraw congressional districts); *Scott v. Germano*, 381 U.S. 407, 409 (1965); *Smiley v. Holm*, 285 U.S. 355, 372 (1932) (Court held that Article I, § 4 did not preclude the state governor from vetoing a state congressional reapportionment law); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 569 (1916).

Although Petitioners argue that this case is similar to the case entertained by this Court in *Bush v. Gore*, 531 U.S. 98, the *Bush* opinion provides no support for Petitioners' claim for relief. The *Bush* case addressed unsettled questions about the constitutional mechanism for selecting presidential electors and the impact that differing legal standards for counting ballots might have upon voters' equal protection rights. The opinion relied upon "the problem of equal protection in election processes," and ordered relief because the recount ordered in that case lacked "minimal procedural safeguards." *Bush v. Gore*, 531 U.S. at 109. This case does not present a single one of these issues.

2. The New Jersey Supreme Court's Opinion Interpreted State Election Law In A Manner Consistent With Statutory Language and Past Precedent

Even if a federal question might be raised by a state court interpretation of state law that was irreconcilable with written law and past precedent, the interpretation at issue in this case was an entirely reasonable interpretation of state law under existing precedent. Contrary to Petitioners' assertions, the New Jersey Supreme Court did not "re-write" the election statutes when it construed New Jersey's election laws. Rather, it acted precisely as the judicial branch of government is supposed to act. The decision below is entirely consistent with the court's longstanding view, which has survived without legislative interference, that the general intent of the

election laws is to safeguard the paramount right to vote and choose freely among candidates, and that the various time provisions in New Jersey's election statutes are intended to give election officials sufficient time to prepare for the election. Once the New Jersey Supreme Court was satisfied that the mechanics of the preparation of the ballots had not been unduly compromised, it was proper for—indeed, incumbent upon—the court to construe the time periods contained in N.J. Stat. Ann. § 19:13-20 in a manner that would avoid offending the clear purposes of New Jersey's election laws.

N.J. Stat. Ann. § 19:13-20 sets forth the procedure for filling vacancies among primary election nominees, "which vacancy shall occur not later than the 51st day before the general election," and provides that, in the case of an office to be filled by the voters of the entire State, the candidate shall be selected by the State Committee of the political party wherein such selection is made "not later than the 48th day preceding the date of the general election. . . ." N.J. Stat. Ann. § 19:13-20 (2002). Although the statute describes how parties are to select new candidates to fill a vacancy in their party created more than fifty-one days before the general election, it does not state any procedure to follow when a vacancy occurs fewer than fifty-one days before the election. The New Jersey Supreme Court simply concluded that in the absence of explicit direction, state law could not be construed to bar parties from filling vacancies that occur after fifty-one days before the election.

The New Jersey Supreme Court reached its decision by following the precedent established by the two most relevant state court decisions interpreting N.J. Stat. Ann. § 19:13-20 and its predecessor. Br. in Opp. 8a-10a. In *Kilmurray v. Gilfert*, 91 A.2d 865 (N.J. 1952), the New Jersey Supreme Court interpreted the prior version of N.J. Stat. Ann. § 19:13-20 (which then read, "which vacancy shall occur not later than thirty-seven days before the general election"), and

concluded that it did not prevent county political committees from filling vacancies occurring less than thirty-seven days before the general election. *Id.* at 866, 867-68. Recognizing the deadline as a means of balancing the "obvious intent of the Legislature" to "afford the various election officials sufficient time in which to attend to the mechanics of preparing for the general election" against the legislature's "general intent" to "preserve the two-party system," *id.* at 867, the court held that it served the general legislative intent to relax the time frame set forth in N.J. Stat. Ann. § 19:13-20 and to submit to the electorate a ballot bearing the names of candidates of both political parties. *Id.* at 868. All of these factors weigh in favor of the state court's decision in this case as well. See also *Catania v. Haberle*, 588 A.2d 374, 379 (N.J. 1990) ("This Court has never announced that time limitations in election statutes should be construed to bar candidates from the ballot when that makes no sense and when it is obviously not the Legislature's intent. There are states that have such rules, but New Jersey is not one of them."[2]); *Wene v. Meyner*, 98 A.2d 573, 578 (N.J. 1953) ("A statute is not to be given an arbitrary construction, according to the strict letter, but rather one that will advance the sense and meaning fairly deducible from the context"); *Clemency v. Beech*, 703 A.2d 399, 401 (N. J. Super. Ct. Law Div. 1997) ("The sentiments of the voters should not be defeated by an act for which the voter is not responsible unless there is a direct and express mandate by statute that allows for no other interpretation.") (citations omitted).[3]

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[2] Indeed, the New Jersey Supreme Court pointed out in its opinion in this case that a number of States, including New York, "have explicitly dealt with the consequences when a vacancy occurs outside of [the statutory] window" and have held that non-compliance with statutory deadlines is a fatal defect. See Br. in Opp. 13a.

[3] In April 2002, Petitioner Douglas Forrester New Jersey law includes no such absolute restriction. And his counsel below made an even more

The New Jersey Supreme Court decision also properly applied longstanding rules of statutory construction in New Jersey. It is axiomatic under New Jersey law that the Legislature is presumed to be aware of judicial construction of its enactments. *Brewer v. Porch*, 249 A.2d 388, 391 (N.J. 1969). Moreover, it is well settled that, in construing a statute, a Court will assume that the Legislature is "thoroughly conversant with its own legislation and the judicial construction placed thereon," particularly when the statute has been amended in other specific places without change to the language in question. *Quaremba v. Allan*, 334 A.2d 321, 328 (N.J. 1975) (citations omitted). In 1985, against the background of case law that had interpreted N.J. Stat. Ann. § 19:13-20 and other election provisions consistent with a legislative intent that the time limitations be deemed directory rather than mandatory, the New Jersey legislature amended N.J. Stat. Ann. § 19:13-20 to change the number of days set forth in the statute for filling vacancies.[4] The amendment did

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expansive argument while seeking to relax, for his own benefit, a statutory time period in the state election law. In his letter brief to the Superior Court of New Jersey, Bergen County, Forrester argued that "Election laws must be read to prevent disenfranchisement of voters, or as in this case, to prevent infringement upon first amendment rights," and that "[s]trict compliance to statutory requirements and deadlines within Title 19 are set aside where such rights may be accommodated without significantly impinging upon the election process." Letter Brief of Forrester for Senate to the Superior Court of New Jersey, Bergen County, Case No. Ber1352502, at 5 (Apr. 26, 2002) (copy on file with Respondents' counsel).

[4] The statute was amended as a consequence of the Legislature having to expand the timetables set forth therein to accommodate changes to New Jersey's absentee ballot law. Br. in Opp. 16a. Prior to 1985, N.J. Stat. Ann. § 19:13-20 envisioned that a vacancy could be filled until thirty-four days before the General Election. The thirty-four-day period which existed in the prior statute was expanded only to accommodate a change in the absentee voting law, which increased the period of time in which County Clerks are now allowed to mail out absentee ballots from twenty-five days to forty days under N.J. Stat. Ann. § 19:57-8.

not change any other statutory language to indicate that the time periods therein should be deemed mandatory. Had the Legislature intended non-compliance with the fifty-one and forty-eight day time periods set forth in N.J. Stat. Ann. § 19:13-20 to be fatal to the filling of a vacancy, it clearly could have amended the statute to specify such a restriction, particularly given the legal precedent that existed at the time the statute was amended. The failure to do so can only be deemed to be an implied ratification that the courts' interpretation of the statute was consistent with election policy and procedure established by the Legislature pursuant to constitutional authority.[5]

3. The Decision Of The New Jersey Supreme Court Did Not Violate The Uniform And Overseas Citizens Absentee Voting Act, 42 U.S.C. §§ 1973ff *et seq.* Or State Election Statutes Relating To Absentee Ballots

Petitioners make a blanket allegation that the New Jersey Supreme Court's decision usurps the state legislature's authority to comply with the "Uniformed and Overseas Citizens Absentee Voting Act" ("UOCAVA" or "Act"), 42 U.S.C. §§ 1973ff *et seq.* However, the Petitioners are unable to set forth any facts to support this contention.

42 U.S.C. §1973ff-1 sets forth each State's responsibilities with regard to the Act. It states in pertinent part that:

> Each State shall—
>
> (1) permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office;

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[5] The New Jersey Supreme Court also noted in its Opinion, Br. in Opp. 17a n6., that state courts regularly interpret withdrawal and substitution deadlines with great flexibility.

(2) accept and process, with respect to any election for Federal office, any otherwise valid voter registration application and absentee ballot application from an absent uniformed services voter or overseas voter, if the application is received by the appropriate State election official not less than 30 days before the election;

(3) permit overseas voters to use Federal write-in absentee ballots (in accordance with section 1973ff-2 of this title) in general elections for Federal office; and

(4) use the official post card form (prescribed under section 1973ff of this title) for simultaneous voter registration application and absentee ballot application.

42 U.S.C. §1973ff-1. UOCAVA generally prescribes procedures for States to follow to assure that uniformed and overseas voters, as those terms are defined in 42 U.S.C. § 1973ff-6, are provided with an opportunity to vote. Under the aforementioned statutory scheme, Petitioners have not set forth any facts that would rise to the level of a statutory violation.

Petitioners claim that the New Jersey Supreme Court decision violated federal law and the Constitution because the Act allegedly requires States to send out absentee ballots no later than thirty-five days before a general election. Pet. at 15-16. However, even a cursory reading of UOCAVA shows that this position is unfounded. No provision of 42 U.S.C. §§ 1973ff *et seq.* contains this supposed thirty-five day requirement. In fact, the Petitioners do not and cannot point to any section of UOCAVA that sets forth the alleged thirty-five day requirement. Rather, Petitioners erroneously state that "[f]ederal courts have interpreted" UOCAVA to require States to send out absentee ballots no later than thirty-five days before a general election. Pet. at 15. This is simply not true.

As noted above, 42 U.S.C. § 1973ff-1 sets forth each State's responsibilities with regard to the Act. Nothing in the language of UOCAVA requires States to mail absentee

ballots more than thirty-five days before a general election. If anything, it requires the contrary, because § 1973ff-1(2) requires States to accept registration applications from absent uniformed service and overseas voters *up to thirty days prior to a general election*. Under the Petitioners' reading of UOCAVA, a State complying with the explicit language of the Act by accepting an application for an overseas ballot on the thirtieth day before an election would be violating the supposed thirty-five day mailing requirement. Petitioners' interpretation of UOCAVA is in direct conflict with its plain language.

To support the contention that the statute sets forth a thirty-five day rule, Petitioners rely upon *Harris v. Florida Elections Canvassing Comm'n*, 122 F. Supp. 2d 1317 (N.D. Fla. 2000). Petitioners do not rely on a court's interpretation of the statute, however, but on a consent decree entered against the State of Florida in another case. Of course, New Jersey was not a party to that proceeding, and is not subject to that or any other consent decree with respect to this issue. As a result, there is no basis for concluding that New Jersey is required under the UOCAVA or any other statute to mail its military absentee ballots at any particular time.[6]

While the decision in *Bush v. Hillsborough County Canvassing Bd.*, 123 F. Supp. 2d 1305 (N.D. Fla. 2000), contains language that calls upon States to ensure that overseas citizens and military personnel are able to vote in a timely manner, nothing in the New Jersey Supreme Court's decision will prevent that from occurring. Indeed, the New Jersey Supreme Court's order explicitly requires that

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[6] Because *Harris*, 122 F. Supp. 2d 1317 (N.D. Fla. 2000) merely applied the consent decree and subsequently-enacted Florida regulations to one of the parties to that decree—the State of Florida—it is irrelevant here. The *Harris* court certainly never found, as a matter of law, that any State was required to send out absentee ballots thirty-five days before a general election.

"military and overseas ballots . . . be given precedence in preparation and mailing." Pet. 5a. Moreover, Judge Feinberg's Order maps out extensive judicial and administrative oversights to ensure the integrity of the balloting process.

The implausibility of Petitioners' argument is reinforced by the fact that, if Petitioners are correct, UOCAVA preempts States from allowing the substitution of names on ballots within thirty-five days of an election at any time. A number of States explicitly permit such substitutions within as little as seven days or less of the election itself.[7] See also *Flake v. Bd. of Elections*, 122 A.D.2d 94, 96, 504 N.Y.S.2d 465, 467 (N.Y. App. Div. 1986) (noting that candidate for U.S. House of Representatives, whose name was improperly omitted from absentee ballots, would have had "sufficient time for a court to rectify the omission" with eighteen days remaining before the ballot). There is nothing in the statute to indicate that Congress intended to deprive States of the flexibility that so many rely upon to cure contingencies that arise in the election process.

To buttress their argument, Petitioners erroneously state that N.J. Stat. Ann. § 19:57-7 requires notice and publication of absentee ballots fifty days before an election. See Pet. at 14. However, even a cursory reading of that statute proves that this claim is baseless. N.J. Stat. Ann. § 19:57-7 requires county clerks to publish notices to military service voters and civilian voters desiring absentee ballots prior to the fiftieth day preceding the election day. These notices inform military service people and civilian voters desiring absentee ballots of the procedures to be followed in requesting said ballots. The statute does not require that any ballots be "published" prior

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[7] See, e.g., Md. Code Ann. art. 33 § 5-1002 (2001) (permitting the filling of a vacancy "by the later of the fortieth day before the general election or the fifth day following...the declination of the nominee"); Minn. Stat. § 204B.13 (2001) (within 14 days); S.C. Code Ann. § 7-11-55 (2001) (within 2 weeks).

to the fiftieth day immediately preceding the election. More importantly, New Jersey statutes do not permit the forwarding of any ballots prior to the fortieth day preceding the election day. N.J. Stat. Ann. § 19:57-11 sets forth the procedures for forwarding military service and civilian absentee ballots by mail or hand delivery, and provides, in relevant part, that each "[s]uch ballot shall be so forwarded as soon as practicable after the fortieth day preceding the day upon which any election is to be held." N.J. Stat. Ann. § 19:57-11. As the preceding language makes patently clear, N.J. Stat. Ann. § 19:57-11 does not set forth a deadline of forty days prior to an election by which absentee ballots must be mailed. To the contrary, the statute sets forth a starting point for delivery of such ballots no sooner than forty days preceding the election day at issue.

Far from conflicting with the provisions of N.J. Stat. Ann. §§ 19:57-7 and 19:57-11, the New Jersey Supreme Court's decision is wholly consistent with that statute. The court ordered, and the lower court has structured, a detailed process under executive branch and judicial supervision for the protection of the rights of all voters, including absentee voters. Nothing in the record supports the claim that any absentee or overseas voter will be disenfranchised in violation of his or her constitutional or statutory rights. The court ordered implementation of a detailed procedure designed to ensure that ballots will be delivered to military and absentee voters as soon as practicable within the forty-day period that precedes the November 5 general election, as contemplated by N.J. Stat. Ann. § 19:57-11.[8] Under the New Jersey Supreme Court decision, all voters will be given a ballot and an opportunity to cast that ballot, without any possibility of

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[8] It is important to note that, consistent with the New Jersey Supreme Court's Order, all corrected ballots were printed by October 8, 2002, twenty-eight days before the November 5, 2002 general election. Therefore, Petitioners' speculative claims are now moot.

disenfranchisement or dilution. Moreover, the process structured by the New Jersey Supreme Court gave discretion to Judge Feinberg to extend the time for certifying the election to allow absentee ballots to be tabulated. Br. in Opp. 21a. The New Jersey Supreme Court's decision does not violate either UOCAVA or state election laws relative to absentee and overseas ballots, and presents no federal question worthy of this Court's review.

4. The Decision Of The New Jersey Supreme Court Does Not Violate The Due Process Clause Of The United States Constitution

Petitioners' allegations of due process violations rely on wholly speculative factual premises that are, moreover, inconsistent with the factual record established in the New Jersey Supreme Court. Petitioners state that the Due Process Clause has been violated because:

> [T]hose voters who have already cast their ballots in compliance with the rules that were in place prior to the New Jersey Supreme Court's decision have had their votes invalidated, and there is no guarantee that they will be able to receive and cast further absentee ballots in this election. Many of these citizens may not go to the trouble of securing a new absentee ballot and casting their ballot a second time. Immediate attention from this Court is required to protect the rights of these voters.

Pet. at 18.

Contrary to Petitioners' speculation that some people may not be able to receive and cast new absentee ballots, the New Jersey Supreme Court received testimony and information from the County Clerks that compliance with the court's order would be possible within a period of (at the most) five days. See Resp't Opp. Addendum 5. And, in fact, under a process supervised by Judge Feinberg, a process was undertaken pursuant to which all voters did receive ballots

and an opportunity to vote. The New Jersey Supreme Court actively considered and has striven to protect the interests of absentee voters, ordering that the "schedule for the mailing of revised ballots provided for by this Order shall be set by Judge Feinberg in a manner that *assures that ballots can be completed and return* (sic) *in time* for the November 5, 2002 general election." Pet. 6a. (emphasis added). Accordingly, there has been no showing that any voter (including absentee voters) was disenfranchised or did not have an opportunity to receive and cast a ballot.

Nor is there any basis for the claim that any votes will be "invalidated." Petitioners' argument on this point is premised on an unsupported assumption that, *if* there were a small number of absentee voters who have already returned a ballot, these ballots will be "invalidated." Pet. at 18. Nowhere does the New Jersey Supreme Court decision say (or imply) that any votes cast would be invalidated. In the unlikely event that there were people who voted absentee before the ballot change, and who did not vote again on the new ballots being prepared, there is no reason to believe that the original ballots will not be counted. And, in the further unlikely event that during the counting process an election official "invalidates" or refuses to count a ballot that has already been cast (where the person did not cast a new ballot), steps, including judicial intervention, can be taken to ensure that all valid votes are counted and no New Jersey voter is disenfranchised.

In any event, the decision below did not constitute a retroactive change to New Jersey election law that could constitute a due process violation. As set forth above, the New Jersey Supreme Court's decision was consistent with established case law and canons of statutory construction of the state election laws. The sole case that Petitioners cite in support of a claimed due process violation is not binding on this Court, and is in any event inapposite. *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995) (per curiam), involved a claim

of Alabama voters that the effectiveness of their votes would be diluted by a retroactive abrogation of longstanding rules that required the invalidation of absentee ballots that were not signed by two witnesses. The Eleventh Circuit's finding of a due process violation was based on the fact that the change in Alabama law resulted in the counting of selected ballots that had previously been regarded as illegal, and "constitute[d] a *post-election* departure from previous practice in Alabama." *Id.* at 581 (emphasis added).

Here there is no possibility of a claim of a post-election change in the law. All voters will be given a ballot and an opportunity to cast that ballot, without any possibility of disenfranchisement or dilution. As the Eleventh Circuit explained in *Roe*, it is only where the "election process itself reached the point of patent and fundamental unfairness, [that] a violation of the due process clause may be indicated." *Id.* at 580 (citations omitted). The Ninth Circuit harmonized existing law on this point in *Bennett v. Yoshina*, 140 F.3d 1218 (9th Cir. 1998):

> A general pattern emerges from all these cases taken together. Mere fraud or mistake will not render an election invalid. However, a court will strike down an election on substantive due process grounds if two elements are present: (1) likely reliance by voters on an established election procedure and/or official pronouncements about what the procedure will be in the coming election; *and* (2) significant disenfranchisement that results from a change in the election procedures.

Id. at 1226-27 (emphasis added).

Neither of these criteria is present here. The vast majority of the voters of the State of New Jersey did not yet "rely" on any candidates being on the ballots prior to the New Jersey Supreme Court's decision—reliance on candidates' appearance on the ballots does not occur until a voter has cast a vote, which the vast majority of voters did not do before

former Senator Lautenberg was certified for the ballot. And, the second requirement surely has not been met—there has not been "significant disenfranchisement" of any voters; indeed, there has been no disenfranchisement at all. According to Petitioners, 1,600 absentee ballots and 106 military ballots have been mailed to voters and "[a]n unknown number of these citizens of New Jersey have already cast their absentee ballots." Appl. at 4-5. However, the submission by John M. Carbone indicates that, of the ballots that have been mailed, a total of four have been returned or "cast." Resp't Opp. Addendum 5. Moreover, the New Jersey Supreme Court put in place procedures to assure that all voters will be informed of the change in the ballot and secured the right to make—and if necessary revise—their choices. As the New Jersey Supreme Court stated:

> We are satisfied that the procedures we have put in place will be orderly and expeditious and that all voters will be able to cast their ballots for a candidate of their choice in the general election of November 2002.

Br. in Opp. 18a. Under these circumstances, no due process violation has occurred, and no issue is presented meriting this Court's further review.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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November 4, 2002

APPENDICES

APPENDIX A

SUPREME COURT OF NEW JERSEY

A-24 September Term 2002

THE NEW JERSEY DEMOCRATIC PARTY, INC.; THE NEW JERSEY DEMOCRATIC STATE COMMITTEE, and THE HON. BONNIE WATSON COLEMAN, in her official capacity AS CHAIR OF THE NEW JERSEY DEMOCRATIC PARTY and OF NEW JERSEY DEMOCRATIC STATE COMMITTEE; and JOHN or JANE DOE, yet to be selected DEMOCRATIC PARTY CANDIDATE FOR THE OFFICE OF UNITED STATES SENATOR, STATE OF NEW JERSEY,

Plaintiffs-Appellants,

v.

HON. DAVID SAMSON, Attorney General, State of New Jersey, in his official capacity; HON. REGENA THOMAS, Secretary of State of the State of New Jersey in her official capacity; HON. RAMON DE LA CRUZ, Director of New Jersey Division of Elections; HON. MICHAEL J. GARVIN, Clerk, County of Atlantic, in his official capacity; HON. KATHLEEN A. DONOVAN, Clerk, County of Bergen, in her official capacity; HON. PHILIP E. HAINES, Clerk, County of Burlington, in his official capacity; HON. JAMES BEACH, Clerk, County of Camden, in his official capacity; HON. ANGELA F. PULVINO, Clerk, County of Cape May, in her official capacity; HON. GLORIA NOTO, Clerk, County of Cumberland, in her official capacity; HON. PATRICK J. MCNALLY, Clerk, County of Essex, in his official capacity; HON. JAMES N. HOGAN, Clerk, County of Gloucester, in his official capacity; HON. JANET E. HAYNES, Clerk, County of Hudson, in her official capacity; HON. DOROTHY K. TIRPOK, Clerk, County of Hunterdon, in her official capacity; HON. CATHERINE DICOSTANZO, Clerk, County of

Mercer, in her official capacity; HON. ELAINE M. FLYNN, Clerk, County of Middlesex, in her official capacity; HON. M. CLAIRE FRENCH, Clerk, County of Monmouth, in her official capacity; HON. JOAN BRAMHALL, Clerk, County of Morris, in her official capacity; HON. M. DEAN HAINES, Clerk, County of Ocean, in his official capacity; HON. RONNI D. NOCHIMSON, Clerk, County of Passaic, in her official capacity; HON. GILDA T. GILL, Clerk, County of Salem, in her official capacity; HON. R. PETER WIDIN, Clerk, County of Somerset, in his official capacity; HON. ERMA GORMLEY, Clerk, County of Sussex, in her official capacity; HON. JOANNE RAJOPPI, Clerk, County of Union, in her official capacity; HON. TERRANCE D. LEE, Clerk, County of Warren, in his official capacity; MR. DOUGLAS FORRESTER, Candidate for the United States Senate (Republican); MR. TED GLICK, Candidate for the United States Senate (Green Party); MS. ELIZABETH MACRON, Candidate for the United States Senate (Libertarian Party); and MR. NORMAN E. WAHNER, Candidate for the United States Senate (New Jersey Conservative Party),

Defendants-Respondents,

and MR. GREGORY PASON, Candidate for the United States Senate (Socialist Party),

Defendant.

October 2, 2002, Argued
October 2, 2002, Decided
October 8, 2002, Opinion Filed

JUDGES: PORITZ, C.J. JUSTICES COLEMAN, LONG, VERNIERO, LaVECCHIA, ZAZZALI and ALBIN join in CHIEF JUSTICE PORITZ'S opinion.

OPINION

PORITZ, C.J.

By order dated October 2, 2002, we granted relief permitting the New Jersey Democratic State Committee to select a candidate to replace Senator Robert G. Torricelli on the November 2002 ballot. We issued the Order without opinion because, in our view, "the interests of justice required the immediate issuance of an Order disposition with the Court's opinion to follow in due course." *New Jersey Democratic Party v. Samson*, 2002 N.J. LEXIS 1296, ___ N.J. ___, at ___ (slip op. at 5).

This opinion sets forth the basis for our disposition.

I

On September 30, 2002, Senator Robert G. Torricelli announced his withdrawal as the New Jersey Democratic Party's candidate for the United States Senate in the November 5, 2002, general election. On October 1, 2002, the New Jersey Democratic Party, with other related plaintiffs [1] (generally plaintiffs), filed a Complaint in Lieu of Prerogative Writs and Order to Show Cause seeking temporary restraints in the Superior Court, Law Division, Middlesex County. Simultaneously, plaintiffs filed a Motion for Direct Certifi-

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[1] The New Jersey Democratic Party, Inc.; the New Jersey Democratic State Committee, and Bonnie Watson Coleman, as Chair of the New Jersey Democratic Party and New Jersey Democratic State Committee; and John or Jane Doe, Democratic Party Candidate for the Office of United States Senator, State of New Jersey.

Defendants are David Samson, Attorney General, State of New Jersey; Regena Thomas, Secretary of State, State of New Jersey; Ramon de la Cruz, Director, New Jersey Division of Elections; the twenty-one County Clerks, in their official capacity, named individually; Douglas Forrester, Republican candidate; Ted Glick, Green Party candidate; Elizabeth Macron, Libertarian Party candidate; and Norman E. Wahner, New Jersey Conservative Party candidate.

cation with this Court pursuant to New Jersey Court Rule 2:12-1, which permits the Supreme Court, on its own motion, to certify any action or class of actions for direct appeal. As described in our subsequent Order of October 2, 2002, plaintiffs asked this Court for an injunction prohibiting Robert G. Torricelli's name from appearing on the November 5, 2002, general election ballot, declaring that the New Jersey Democratic State Committee (State Committee) may proceed to select a candidate to fill the vacancy created by Senator Torricelli's withdrawal, and permitting Senator Torricelli's name to be replaced on the general election ballot with the name of the candidate to be selected by the State Committee. New Jersey Democratic Party, *supra*, 2002 N.J. LEXIS 1296 at ___ (slip op. at 3). Plaintiffs further requested that an order be issued directing the twenty-one county clerks to substitute the new candidate's name "on all ballots, whether absentee, military, provisional, emergency, voting machine, ballot card, or otherwise." *Id.*, 2002 N.J. LEXIS 1296 at ___ (slip op. at 3).

Also on October 1, 2002, the trial court issued an Order to Show Cause and stayed the printing of the ballots for the general election. Later that day, this Court directly certified the matter on its own motion and dismissed plaintiffs' application for direct certification as moot. At the same time, the Court declared moot the Order to Show Cause issued by the Law Division, and ordered that the stay of the printing of the ballots imposed by the lower court remain in effect until our further order. The parties were required to file supplemental briefs and the matter was set down for oral argument at 10:00 a.m. on October 2, 2002.

Subsequent to argument on October 2, 2002, the Court unanimously granted plaintiffs' application for the removal of Senator Torricelli's name from the ballot for the general election of November 5, 2002, and ordered that his name be replaced by the name of the candidate selected by the State

Committee. *Id.*, 2002 N.J. LEXIS 1296 at ____ (slip op. at 5-6). The Court further required that the "preparation of revised ballots . . . proceed forthwith under the direction of the Attorney General of New Jersey and the supervision of Superior Court Judge Linda R. Feinberg, A.J.S.C. (Mercer County), who [was] empowered . . . to exercise statewide jurisdiction over the process." *Id.*, 2002 N.J. LEXIS 1296 at ___ (slip op. at 6). The parties were ordered to meet with Judge Feinberg on the following day, October 3, 2002, in order "to expedite the implementation of [the Court's] Order." *Id.*, 2002 N.J. LEXIS 1296 at ___ (slip op. at 6).

More specifically, the Court focused on military and overseas ballots and required that those ballots "be given precedence in preparation and mailing." *Id.*, 2002 N.J. LEXIS 1296 at ___ (slip op. at 6). "All of the costs related to the preparation and, when necessary, the mailing of revised ballots" were ordered to "be borne by plaintiffs and paid under the supervision of Judge Feinberg." *Id.*, 2002 N.J. LEXIS 1296 at ___ (slip op. at 6). To facilitate such payment, plaintiffs were further required to deposit "$800,000, or such other sum as Judge Feinberg may find to be necessary and appropriate to meet the costs of implementing [the Court's] Order, said deposit to be made in full or in such installments as Judge Feinberg shall determine, beginning no later than Friday, October 4, 2002." *Id.*, 2002 N.J. LEXIS 1296 at ___ (slip op. at 6-7). The Attorney General was ordered to oversee the described election activities "pursuant to his authority as the chief election official of the State of New Jersey;" to "take all steps necessary to avoid voter confusion, including, but not limited to the preparation of an explanatory letter to all voters to whom a revised ballot [is] sent;" and to report to Judge Feinberg in respect of the Court's requirements. *Id.*, 2002 N.J. LEXIS 1296 at ___ (slip op. at 7). Finally, the Court ordered Judge Feinberg to set the schedule for mailing revised ballots in a manner "that assures that ballots can

be completed and returned in time for the November 5, 2002, general election." *Id.*, 2002 N.J. LEXIS 1296 at ___ (slip op. at 7).

II

A

Fifty years ago, Chief Justice Vanderbilt restated the principles that guide our decision in this case:

> Election laws are to be liberally construed so as to effectuate their purpose. They should not be construed so as to deprive voters of their franchise or so as to render an election void for technical reasons.

Kilmurray v. Gilfert, 10 N.J. 435, 440-41, 91 A.2d 865 (1952) (citations omitted).

The concept is simple. At its center is the voter, whose fundamental right to exercise the franchise infuses our election statutes with purpose and meaning.

> It has not always been so. In 1965, Chief Justice Weintraub spoke eloquently of the gradual alteration of our understanding in respect of that right we now deem fundamental. Universal suffrage did not come early in our history, but today, despite an impoverished beginning, the right to vote has taken its place among our great values. Indeed the fact that the voting franchise was hoarded so many years testifies to its exalted position in the real scheme of things. It is the citizen's sword and shield. "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S. Ct. 526, 585, 11 L. Ed. 2d 481, 492 (1964). It is the keystone of a truly democratic society.

Gangemi v. Rosengard, 44 N.J. 166, 170, 207 A.2d 665 (1965).

Those ideas now appear self-evident—as does a corollary principle also described by Chief Justice Weintraub:

> The right to vote would be empty indeed if it did not include the right of choice for whom to vote. . . . "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."

Ibid. (citations omitted) (quoting *Reynolds v. Sims*, 377 U.S. 533, 555, 84 S. Ct. 1362, 1378, 12 L. Ed. 2d 506, 523 (1964)).

The right of choice as integral to the franchise itself, unlike universal suffrage, is grounded in the core values of the democratic system established by the framers of our Federal Constitution when this country was founded. In *Powell v. McCormack*, 395 U.S. 486, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969),[2] the United States Supreme Court adverted to that history, stating:

> A fundamental principle of our representative democracy is, in Hamilton's words, "that the people should choose whom they please to govern them." 2 Elliot's Debates 257. As Madison pointed out at the Convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself.

Id., 395 U.S. at 547, 89 S. Ct. at 1977, 23 L. Ed. 2d at 531.

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[2] In *Powell, supra*, 395 U.S. at 549, 89 S. Ct. at 1979, 23 L. Ed. 2d at 533, Representative Adam Clayton Powell (NY) was not permitted to take his seat in the ninety-first Congress because, subsequent to his re-election, Congress passed a resolution excluding him from the House. The United States Supreme Court held that it was unlawful for Congress to exclude Powell on grounds other than the age, citizenship, and residency requirements of Article I, § 2 of the Federal Constitution.

B

Those precepts have directly informed the decisions of this Court and of our lower courts interpreting New Jersey election law in a variety of factual contexts. In *Kilmurray v. Gilfert, supra*, 10 N.J. at 441-42, for example, we permitted a substitute candidate to be placed on the ballot in lieu of a candidate who had died thirty-six days prior to the general election. At the time, the statute established the manner in which vacancies that occurred more than thirty-seven days prior to the election may be filled. R.S. 19:13-20 (current version at N.J.S.A. 19:13-20 (1985)). Because the candidate had died outside of the statutory window, plaintiffs argued that a new candidate could not be presented to the electorate even though the county committee was able to select the new candidate within the statutory time frame for such selection. *Ibid.* ("In the event of a vacancy, howsoever caused, . . . which vacancy shall occur not later than thirty-seven days before the general election, . . . a candidate shall be selected [by the party's county committee] . . . no later than thirty-four days prior to the general election." *Kilmurray, supra*, 10 N.J. at 438-39 (quoting now amended R.S. 19:13-20). The Court deemed the thirty-seven day limitation to be directory and not mandatory, essentially holding that so long as the new candidate was selected by the committee within the thirty-four day period, that candidate had an absolute right to appear on the ballot. Most important, in Kilmurray the Court interpreted the time frames in the election laws "so as to effectuate [the statutory] purpose," *id.* at 441, stating,

> It is in the public interest and the general intent of the election laws to preserve the two-party system and to submit to the electorate a ballot bearing the names of candidates of both major political parties as well as of all other qualifying parties and groups.

Kilmurray, supra, 10 N.J. at 441 (emphasis added) (citation omitted); *see also Hand v. Larason*, 163 N.J. Super. 68, 75,

394 A.2d 163 (Law Div. 1968) (holding that one candidate could not win primaries of both parties because "the public interest, as it is served by the multiparty political system, is a lodestar to the construction of Title 19").

Subsequently, in *Wene v. Meyner*, 13 N.J. 185, 98 A.2d 573 (1953), the Court permitted votes to be counted in a gubernatorial primary election when the voter had neither "'voted in a primary election of a political party for two subsequent annual primary elections'" nor "'signed and filed with the district board a declaration designating the political party in whose primary [the voter] desires to vote.'" *Id.* at 190-91 (quoting R.S. 19:23-45 (current version at N.J.S.A. 19:23-45)). Regarding the voters' technical noncompliance with the statute, the Court explained:

> A statute is not to be given an arbitrary construction, according to the strict letter, but rather one that will advance the sense and meaning fairly deducible from the context. The reason of the statute prevails over the literal sense of terms; the manifest policy is an implied limitation on the sense of the general terms, and a touchstone for the expansion of narrower terms. As said by Mr. Chief Justice Vanderbilt in *Kilmurray v. Gilfert* . . . : "Election laws are to be liberally construed, so as to effectuate their purpose. They should not be construed so as to deprive voters of their franchise or so as to render an election void for technical reasons."

Id. at 197 (citations omitted); *see also Clemency v. Beech*, 306 N.J. Super. 244, 248, 703 A.2d 399 (1997) (allowing candidate's name to appear on ballot despite late filing of required documents).

In *Gangemi, supra*, 44 N.J. at 174, the Court struck down a statutory residency requirement for elective office that affected only two municipalities in the State. Although the case did not involve questions of statutory interpretation,

Chief Justice Weintraub discussed in some detail "the right of choice for whom to vote." *Id.* at 170. In the context of a limitation "upon eligibility for elective office," he observed that "the restraint is on the right to vote as well." *Ibid.* Ultimately, the Court found the residency requirement to be constitutionally infirm. *Id.* at 173-74. To the extent that alternative interpretations of the election laws are possible, Gangemi teaches that limitations on the right of voter choice in some circumstances will override other considerations.

Twenty-five years later, in *Catania v. Haberle*, 123 N.J. 438, 588 A.2d 374 (1991), the Court again considered a statutory provision that governed the filling of a vacancy on the ballot and the substitution of one candidate for another. There, no Republican had won sufficient votes in the primary election so the Republican County Committees selected a candidate to run in a special election for the New Jersey Assembly. Notice of the Committees' meeting to fill the vacancy was not given within seven days of the primary as required by N.J.S.A. 19:13-20(b)(1), with the result that the Secretary of State refused to accept the Committees' candidate. Chief Justice Wilentz began his analysis with the principle set down in Kilmurray:

> The general rule applied to the interpretation of our election laws is that absent some public interest sufficiently strong to permit the conclusion that the Legislature intended strict enforcement, statutes providing requirements for a candidate's name to appear on the ballot will not be construed so as to deprive the voters of the opportunity to make a choice.

Catania, supra, 123 N.J. at 442-43 (citing *Kilmurray, supra*, 10 N.J. at 440-41); *see also Fulbrook v. Reynolds*, 304 N.J. Super. 125, 133, 698 A.2d 564 (Law Div. 1997) (allowing replacement candidate for city council to further voters' choice of candidates). Anticipating that other cases would

follow in which this Court would have to make similar judgment calls in respect of similar statutory provisions, the Chief Justice continued:

> Concerns have been expressed that by giving this deadline provision a directory, rather than mandatory, construction we will create doubts about many other sections of the election law, a law that is driven by deadlines. Our only response is that this Court has traditionally given a liberal interpretation to that law, "liberal" in the sense of construing it to allow the greatest scope for public participation in the electoral process, to allow candidates to get on the ballot, to allow parties to put their candidates on the ballot, and most importantly to allow the voters a choice on Election Day. Obviously, there will be cases in which provisions must be interpreted strictly, mandatorily, for in some cases it will be apparent that that interpretation serves important state interests, including orderly electoral processes. But those cases must be decided on their own facts, under the law involved. This Court has never announced that time limitations in election statutes should be construed to bar candidates from the ballot when that makes no sense and when it is obviously not the Legislature's intent. There are states that have such rules, but New Jersey is not one of them.

Catania, supra, 123 N.J. at 448 (citations omitted).

When this Court has before it a case concerning the New Jersey election laws, we are directed by principle and precedent to construe those laws so as to preserve the paramount right of the voters to exercise the franchise. We have understood our Legislature, in establishing the mechanisms by which elections are conducted in this State, to intend that the law will be interpreted "to allow the greatest scope for public participation in the electoral process, to allow candidates to

get on the ballot, to allow parties to put their candidates on the ballot, and most importantly to allow the voters a choice on Election Day." *Ibid.*

III

A

In this case, Senator Torricelli has withdrawn his name as the Democratic Party's candidate for the United States Senate after having won his place on the ballot in the primary election. In respect of candidates nominated through the primary system, N.J.S.A. 19:13-20 states,

> In the event of a vacancy, howsoever caused, among candidates nominated at primaries, which vacancy shall occur not later than the 51st day before the general election, or in the event of inability to select a candidate because of a tie vote at such primary, a candidate shall be selected in the following manner:
>
> a. (1) In the case of an office to be filled by the voters of the entire State, the candidate shall be selected by the State committee of the political party wherein such vacancy has occurred.
>
> . . . . d. A selection made pursuant to this section shall be made not later than the 48th day preceding the date of the general election, and a statement of such selection shall be filed with the Secretary of State. . . .

By its terms, Section 20 establishes an absolute right in a State committee to replace a candidate up to and including the forty-eighth day before the general election.

Here,[3] we confront a vacancy created outside of the statutory window. Nothing in N.J.S.A. 19:13-20 addresses the

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[3] In *Kilmurray, supra*, 10 N.J. at 439, the Court concluded that the predecessor statute (*R.S. 19:13-20*), wherein the statutory time frames were set at thirty-seven and thirty-four days rather than fifty-one and

precise question whether a vacancy that occurs between the forty-eighth day and the general election can, in that circumstance, be filled.

B

We observe first that other states have explicitly dealt with the consequences when a vacancy occurs outside of that window. By way of example, the New York analogue to New Jersey's Section 20 states that "the failure to file any petition or certificate relating to the designation or nomination of a candidate for party position or public office or to the acceptance or declination of such designation or nomination within the time prescribed by the provisions of this chapter shall be a fatal defect." N.Y. Elec. Law § 1-106(2) (McKinney 1998) (emphasis added). Another example may be found in the Colorado statute, where the Legislature has declared that any vacancy in a party nomination occurring less than eighteen days before the general election that is caused by the declination, death, disqualification, or withdrawal of any person nominated at the primary election . . . shall not be filled before the general election. In such case, the votes cast for the [withdrawn] candidate . . . are to be counted and recorded, and, if the candidate receives a plurality of the votes cast, such vacancy shall be filled . . . by the respective party vacancy committee . . . .

> Colo. Rev. Stat. Ann. § 1-4-1002 (West 2002). In Washington, the Legislature has similarly declared that when a vacancy occurs after the sixth Tuesday prior to [the] state primary or general election and time does not exist in which to correct ballots (including absentee ballots), . . . then the votes cast or recorded for the

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forty-eight days, was directory in respect of the thirty-seven day withdrawal period. Then, a State committee had an absolute right to replace a candidate up to and including the thirty-fourth day; under the amended statute the operative date is forty-eight days.

> person who has died or become disqualified shall be counted for the person who has been named to fill such vacancy.

Wash. Rev. Code Ann. § 29.18.160 (West 2002).[4]

That other state legislatures have spoken clearly on this question[5] highlights the lack of a legislative declaration in the New Jersey statute. How the New Jersey Legislature would intend the issue to be resolved is the crux of this case.

C

Defendants ask the Court to interpret Section 20 as rendering unlawful per se the filling of a vacancy within fifty-one days of the election. On Election Day, defendants argue, the voters must choose between other candidates and a Democratic Party candidate whose name must remain on the ballot even though he has withdrawn, and even though our statute does not specifically require that his name not be

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[4] Such vacancies are filled by the state central committee of the appropriate political party.

[5] Statutes in many jurisdictions are instructive. Some states set few or no restrictions on the replacement of a candidate before the general election. In Alabama, Kansas and Pennsylvania, for example, a party committee may replace a candidate anytime prior to the general election. Ala. Code § 17-16-41 (2002); Kan. Stat. Ann. § 25-3905; Pa. Stat. Ann. tit. 25, § 2939 (West 2002). Arkansas allows the party committee to fill a vacancy caused by death, illness or relocation, requiring only that the party, within five days of the vacancy, notify the Governor whether the candidate will be replaced by special election or convention. Ark. Code Ann. § 7-7-104 (Michie 2001). In Michigan, if a candidate dies or withdraws, then a state central committee shall meet "forthwith" and select a replacement candidate. Mich. Comp. Laws Ann. §§ 168.98-.99 (West 2002). Under the Minnesota statute, a candidate can withdraw sixteen days prior to the general election and be replaced within fourteen days of the election. Replacement is permitted within four days of the election if the candidate has a catastrophic illness or dies. Minn. Stat. Ann. §§ 204B.12-.13 (West 2002).

removed. If the voters then choose to elect that candidate, the Governor can "make a temporary appointment . . . until a special election or general election shall have been held" pursuant to N.J.S.A. 19:3-26. Plaintiffs contend that the time frame specified in Section 20 was meant to "afford the various election officials sufficient time in which to attend to the mechanics of preparing for the general election." Kilmurray, supra, 10 N.J. at 440. The provision was not enacted, plaintiffs argue, to usurp a fundamental principle of democracy, but must be interpreted so as to afford the voter a real choice among candidates representing a full spectrum of political ideologies. Plaintiffs assert that, in furtherance of that principle, they must be permitted to fill this vacancy forthwith.

In essence, the parties extrapolate contrary views from the language of Section 20 concerning what the Legislature must have intended when a vacancy occurs outside the statutory time frame. We think plaintiffs have the better argument. N.J.S.A. 19:13-20 simply does not contain a legislative declaration that the filling of a vacancy within forty-eight days of the election is prohibited. Unlike the legislatures of our sister states that have clearly expressed the consequences that follow when a vacancy occurs outside of the statutory period, New Jersey has not specifically addressed the issue. When that happens, the Court must consider the "fundamental purpose" of the enactment, and, where it "does not expressly address a specific situation . . . interpret it [in a manner] consonant with the probable intent of the draftsman had he anticipated the matter at hand." *State, Township of Pennsauken v. Schad*, 160 N.J. 156, 170, 733 A.2d 1159 (1999) (citations and internal quotations omitted); *see also Hubbard ex rel. Hubbard v. Reed*, 168 N.J. 387, 396, 774 A.2d 495 (2001) (finding that affidavit of merit statute was silent regarding affidavit requirement in common knowledge malpractice cases); *AMN, Inc. v. Township of So. Brunswick Tp. Rent Leveling Bd.*, 93 N.J. 518, 524-25, 461 A.2d 1138

(1983) (finding that drafters of local ordinance did not contemplate question whether condominium owners would be subject to rent control). It falls, then, to the Court to determine the "essential purpose and design" of the election law so as to effectuate the legislative purpose. *Aponte-Correa v. Allstate Ins. Co.*, 162 N.J. 318, 323, 744 A.2d 175 (2000).

D

We do not believe that our Legislature intended to limit voters' choice in a case where there is sufficient time to place a new candidate on the ballot and conduct the election in an orderly matter. There is no question but that the "full and free expression of the popular will," *Sharrock v. Keansburg*, 15 N.J. Super. 11, 17, 83 A.2d 11 (App. Div. 1951), is furthered by allowing the substitution of a new candidate for the United States Senate chosen by the State Committee. There is also no question but that the Legislature enacted N.J.S.A. 19:13-20 "to afford the various election officials sufficient time in which to attend to the mechanics of preparing for the general election." *Kilmurray, supra*, 10 N.J. at 440. Further, according to the Assembly Committee Statement to the 1985 amendments extending the time frames in the statute, the extension was designed to permit "absentee voters, particularly military and civilian voters dwelling abroad, sufficient time to apply for, receive, execute and return their ballots." Assembly State Gov't., Civil Serv., Elections, Pensions and Veterans Affairs Comm., Statement to Senate Bill No. 2244 (1985). Based on those concerns, the Attorney General has argued that this Court must consider "whether the dual interests of full voter choice and an orderly administration of the election can be effectuated if the requested relief were to be granted." We concur in that approach because it reconciles apparently conflicting goals in a practical manner.

What must be assessed is the actual impact on the administration of the election of allowing the substitution at this point in time; the cost and feasibility of printing and, when

necessary, mailing new ballots; and, more particularly, the effect of carrying out those activities on overseas civilian and military absentee ballots. At bottom, if on the record before us it is administratively feasible to replace Senator Torricelli's name on the ballot, the general statutory intent and underlying purpose of the election laws to enable voters to exercise the franchise and to choose from among various candidates is furthered.[6] If that is not what the Legislature intended, we anticipate that it will amend Section 20 accordingly.

E

On the record before the Court, and with due regard to the representations of the Attorney General and counsel for the county clerks at oral argument, we find that there is sufficient time before the general election to place a new candidate's name on the ballot. In respect of absentee voters, particularly military and civilian New Jersey citizens dwelling abroad, we are informed that of approximately 19,000 absentee ballots authorized as of October 2, 2002, some 1,700 had been mailed and few had been returned. We are also informed that if the printing of new absentee ballots was expedited, most could be prepared and mailed within five business days. We understand that express mailing, both outgoing and return,[7] is

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[6] We observe that the Legislature is presumed to be aware of judicial construction of its enactments. *Brewer v. Porch*, 53 N.J. 167, 174, 249 A.2d 388 (1969). Our cases repeatedly have construed the election laws liberally, consonant with their purpose and with practical considerations related to process. We are aware of only one instance in which the Legislature amended an election provision to prevent the filling of a vacancy, effectively overriding the decision of this Court in *Fields v. Hoffman*, 105 N.J. 262, 520 A.2d 751 (1987). *See Catania, supra*, 123 N.J. at 444 (declining to apply the amended statute retroactively).

[7] In New Jersey, votes can be returned by fax pursuant to N.J.S.A. 19:59-14.

available to and from most overseas locations, and that if a source of funding for those activities is available, they can be carried out expeditiously.

Convinced that the absentee ballots can be handled in a manner that will not disenfranchise absentee voters, we required by order that the Attorney General oversee those election activities, "including, but not limited to, the preparation of an explanatory letter to all voters to whom a revised ballot has been sent." *New Jersey Democratic Party, supra*, 2002 N.J. LEXIS 1296 at ___ (slip op. at 7). We empowered Superior Court Judge Linda R. Feinberg to exercise statewide jurisdiction in this matter, and to supervise and control the process. *Id.*, 2002 N.J. LEXIS 1296 at ___ (slip op. at 6). We ordered military and civilian absentee ballots to be given first priority in preparation and mailing and required plaintiffs to bear the costs of implementing the necessary election activities, including the preparation and mailing of revised ballots. *Id.*, 2002 N.J. LEXIS 1296 at ___ (slip op. at 6). Finally, we ordered that the schedule for the mailing of revised ballots "shall be set by Judge Feinberg in a manner that assures that ballots can be completed and returned in time for the November 5, 2002 general election." *Id.*, 2002 N.J. LEXIS 1296 at ___ (slip op. at 7).

We are satisfied that the process we have put in place will be orderly and expeditious and that all voters will be able to cast their ballots for a candidate of their choice in the general election of November 2002.

IV

Some further comment is warranted in respect of certain arguments presented to the Court by the parties.

Defendants believe that the interpretation of N.J.S.A. 19:13-20 we have adopted will cause electoral chaos because any candidate who fears losing at the polls can withdraw

thereby allowing someone else to run instead.[8] But candidates who choose to withdraw are free under the present scheme to do so for any reason, thus entitling their political parties to replace them on the ballot with impunity up to forty-eight days before the election. We assume that it is difficult for any party, logistically, politically, and financially, to replace a candidate closer to an election. That is not to suggest it cannot happen; it has in this case. However, defendants have not presented any evidence indicating that a rush of withdrawals has occurred in states that allow substitutions close to the election. Most important, if the Legislature credits defendants' "parade of horribles" all it need do, as we noted earlier, is amend the statute expressly to preclude or otherwise condition ballot substitutions after the forty-eighth day.

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[8] Defendants Forrester and Wahner conceded during oral argument that certain exceptions must be read into Section 20 to take into account the death or physical disability of a candidate within forty-eight days of the election. In those circumstances, they would eschew an interpretation of the statute that would deprive the voters of a choice on Election Day. Their disagreement with plaintiffs is not whether the statute permits a new candidate to enter the field within the forty-eight day period before election, but under what circumstances the candidate is permitted to do so. Unlike statutes in other jurisdictions, our statute does not distinguish acceptable reasons from unacceptable reasons for withdrawal as is the case in some other states. *See, e.g.*, S.C. Code Ann. § 7-11-50, -55, (Law. Co-op. 2001) and Miss. Code Ann. § 23-15-317 (2001) (permitting replacement of vacancy if candidate resigned for "legitimate nonpolitical reason," including "condition which, . . . would be harmful to the health of the candidate if he continued," "family crises," and "substantial business conflict"); Minn. Stat. Ann. §§ 204B.12-.13 (West 2001) (establishing deadline for replacement of withdrawn candidate sixteen days before general election, but permitting replacement no later than four days if, after deadline, candidate is diagnosed with "catastrophic illness," which will "permanently and continuously incapacitate the candidate and prevent . . . [performance of candidate's] duties . . . .").

Representatives of the Libertarian, Conservative, and Green parties argue that the existing third-party candidates offer voters a full choice, obviating the need for plaintiffs' requested remedy. Although the participation of third-party candidates supports a robust democracy, we recognize the present reality of the two-party system as an organizing principle of the political process in this country. Cf. Gerald Leonard, Party as a "Political Safeguard of Federalism": Martin Van Buren and the Constitutional Theory of Party Politics, 54 Rutgers L. Rev. 221, 227 (2001) (tracing rise of political parties since beginning of our republic and observing that "two-party system . . . now constitutes the main political safeguard of federalism").

Title 19 reflects the significant role of the two parties in the electoral system. N.J.S.A. 19:44A-10.1 authorizes the leaders of the majority and minority parties in both houses of the Legislature to establish committees to receive contributions and to make expenditures to promote candidates and the passage or defeat of public questions. Indeed, this Court has long accepted that, whatever their shortcomings, "elections take place . . . in the context of a partisan, party-based political system." *Friends of Governor Tom Kean v. New Jersey Election Law Enforcement Comm'n.*, 114 N.J. 33, 35, 552 A.2d 612 (1989). Stated differently, vigorous elections under our present system require the participation of the two major parties. That reality affects the meaning of voter choice within the framework of the statute. Moreover, plaintiffs' remedy does not preclude voters from casting ballots in favor of the Republican candidate already on the ballot, or, as they choose, any one of the third-party candidates seeking election to the United States Senate in the November election. In that regard, our disposition preserves the ability of qualified candidates of all parties to seek and obtain that office consistent with statutory and decisional law.

Finally, defendant Forrester asserts that the federal voting rights of overseas military and civilian absentee ballot voters guaranteed by The Uniformed and Overseas Citizens Absentee Voting Act, 18 U.S.C. §§ 608-609 (2002), 39 U.S.C. § 3406 (2002), 42 U.S.C. § 1973 (2002), will be violated if we grant the relief sought by plaintiffs. Believing that substantial numbers of overseas ballots already may have been mailed, defendant Forrester claims that military and civilian absentee voters may be disenfranchised by the late mailing of new ballots.

The short answer to defendant's concern is that the expeditious handling of amended absentee ballots will assure that the voters who use those ballots will have their votes counted in the general election. If Judge Feinberg concludes at some point that it is necessary to extend the time for certifying the election to allow absentee ballots to be tabulated, that remedy is also available. *See Harris v. Florida Elections Canvassing Commission*, 122 F. Supp. 2d 1317, 1325 (2000) (holding ten-day extension allowing State to count overseas absentee ballots in federal elections to be valid); *see also U.S. v. Wisconsin*, 771 F.2d 244, 245 (1985) (upholding district court order requiring election officials to count certain late-arriving ballots).

V

We have been asked to determine whether a vacancy created by the withdrawal of a major party candidate for the United States Senate may be filled by the State Committee thirty-four days before the election. In the absence of explicit direction from the Legislature, we have construed the relevant statutory provision, N.J.S.A. 19:13-20, to promote the goals underlying our election laws—to ensure an opportunity for voters to exercise their right of choice in the November 2002 senatorial election consonant with an orderly process for the handling of ballots. Our decision is rooted in the statute and our prior precedents interpreting its provisions, and is

informed by the knowledge that the substitution of a candidate at this time will not affect adversely the right of any qualified voter to participate in the election.

For the foregoing reasons, the Court grants the relief as set forth in our Order of October 2, 2002.

JUSTICES COLEMAN, LONG, VERNIERO, LaVECCHIA, ZAZZALI and ALBIN join in CHIEF JUSTICE PORITZ'S opinion.

APPENDIX B

SUPERIOR COURT OF NEW JERSEY LAW
DIVISION—MERCER COUNTY

[Filed Oct 8, 2002]

CIVIL ACTION

DOCKET NO. MER-L-3233-02

THE NEW JERSEY DEMOCRATIC PARTY, INC., *et al.*
Plaintiffs,

v.

HON. DAVID SAMSON, ATTORNEY GENERAL, STATE OF NEW JERSEY in his official capacity, *et al.*
Defendants.

ORDER

This matter having been raised by the Court, *sua sponte;* on this 8th day of October 2002, on notice to counsel for all parties, and for good cause having been shown,

IT IS ON THIS 8th DAY OF OCTOBER 2002,

ORDERED that for all approved absentee ballot applications as of the close of business day, October 7, 2002, each County Clerk is to send out the applicable absentee ballot no later than Wednesday October 9, 2002, using procedures approved by the New Jersey Attorney General, and it is further

ORDERED that the County Clerks shall prioritize the sending out of "corrected" ballots to all those voters for whom a ballot was sent out with Robert Torricelli's name on

it, and shall do so in accordance with the instructions received by the Attorney General providing for the placement of the word "corrected" on all related absentee ballot materials, and the ballot itself if it is feasible to do so; and

IT IS FURTHER ORDERED that for all absentee ballot applications received after October 7, 2002, they shall be processed by County Clerks in a expeditious manner and in continued compliance with the order of October 3, 2002 of this Court and the related instructions of the Attorney General.

/s/ Linda R. Feinberg
LINDA R. FEINBERG, A.J.B.C.